

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

THE HONORABLE JAMES V. SELNA, JUDGE PRESIDING

10 IN RE FONTEM US, INC.,)
CONSUMER CLASS ACTION)
LITIGATION:) SACV-15-01026-JVS
11 -----)
12 Consolidated with:
13 SACV-15-02018-JVS

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Santa Ana, California

September 15, 2016

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1 SANTA ANA, CALIFORNIA; MONDAY, SEPTEMBER 15, 2016; 9:59 A.M.

09:59 2 THE COURT: Item No. 2, SACV-15-01026-JVS, In Re
09:59 3 Fontem Consumer Class Action Litigation consolidated with
09:59 4 SACV-15-2018-JVS.

09:59 5 Counsel, please state your appearances for the
09:59 6 record.

09:59 7 MR. GABRIEL: Good morning, Your Honor. Allan
09:59 8 Gabriel representing all of the defendants.

10:00 9 MR. TODZO: Good morning, Your Honor. Mark Todzo
10:00 10 representing the plaintiffs.

10:00 11 MR. BELIGAN: Good morning, Your Honor. Jerusalem
10:00 12 Beligan on behalf of the plaintiffs.

10:00 13 THE COURT: Good morning.

10:00 14 I trust you have all had a chance to review the
10:00 15 tentative.

10:00 16 MR. TODZO: Yes, Your Honor.

10:00 17 MR. GABRIEL: Yes, Your Honor.

10:00 18 THE COURT: Who is going to argue on behalf of the
10:00 19 plaintiffs?

10:00 20 MR. TODZO: I will.

10:00 21 THE COURT: Okay. Mr. Todzo.

10:00 22 MR. TODZO: Thank you, Your Honor.

10:00 23 Thank you for the tentative. I think that gives
10:00 24 us a lot of interesting questions to discuss today. The
10:00 25 first few things I would like to discuss are things that

10:00 1 really weren't brought out in the papers, but one thing that
10:00 2 kind of struck me when I looked at the end result of your
10:00 3 tentative and also at the first footnote of your
10:01 4 tentative --

10:01 5 THE COURT: Are you telling me you now have
10:01 6 arguments that aren't reflected in your papers?

10:01 7 MR. TODZO: I have two, yes. One is timing
10:01 8 related, and one relates to the opinion that Judge Carter
10:01 9 issued after all of briefing came down. And the remainder
10:01 10 of my arguments just directly relate to the specific issues.

10:01 11 With respect to the timing, Your Honor cites the
10:01 12 effective date at Footnote 1 on page two of the tentative.
10:01 13 And the effective date for the particular FDA requirement
10:01 14 that Your Honor found preempted is May of 2018. And
10:01 15 that raises an interesting question, which is can an
10:01 16 ineffective -- because it's ineffective today -- can an
10:01 17 ineffective federal requirement preempt a state law
10:01 18 today?

10:01 19 When I went back before -- and there is no
10:01 20 specific definition of a requirement in the federal act, but
10:01 21 "requirement" is a common usage term. When I looked at the
10:02 22 definitions of "requirement," they are all present. They
10:02 23 are all present tense: that which is required, a thing that
10:02 24 is demanded or obligatory. So those all imply that there
10:02 25 has to be a present aspect to the particular federal

10:02 1 requirement. And the fact that it doesn't take effect for
10:02 2 two years, it seems as though this is almost like an
10:02 3 advisory type opinion because -- frankly, it's actually very
10:02 4 good to know Your Honor's position, that when the
10:02 5 requirement takes effect in 2018 that it would be preempted
10:02 6 because that may affect certain remedies that would be
10:02 7 available. That's the first issue.

10:02 8 I think it's actually quite similar to the way
10:02 9 Your Honor looked at this issue -- or at least the primary
10:02 10 jurisdiction issue during the first hearing, which was
10:03 11 saying, look, it's premature because the rule hasn't been
10:03 12 finalized. Well, now the rule has been finalized, but the
10:03 13 requirement is defective, so there is definitely some
10:03 14 tension there.

10:03 15 The second timing-related issue is with respect to
10:03 16 sort of the conclusion at the end of the tentative, which is
10:03 17 dismissing all of the claims other than the Prop 65-related
10:03 18 claim with prejudice. Now, the problem there is that those
10:03 19 claims -- all those other claims are claims for damages,
10:03 20 injunctive relief -- well, damages, injunctive relief, but
10:03 21 also restitution.

10:03 22 The damages and restitutionary portions of those
10:03 23 claims all relate back. Most of them have a four-year
10:03 24 statute of limitations. So the limitations period actually
10:03 25 begins in 2011. So there is a period from 2011 until --

10:03 1 let's assume for a second that the ineffective requirement
10:04 2 is essentially preempted as of its publication date. So at
10:04 3 a minimum, you have a period from 2011 up through May 10 I
10:04 4 believe of 2016 when the rule was finalized during which
10:04 5 there was no federal requirement in place.

10:04 6 I think again this sort of relates to when Your
10:04 7 Honor looked at the issue of primary jurisdiction back
10:04 8 before the FDA even had jurisdiction, before the TCA covered
10:04 9 the particular products that are at issue in this case.
10:04 10 There could be no primary jurisdiction because there was no
10:04 11 jurisdiction.

10:04 12 THE COURT: Well, certainly not on the basis of
10:04 13 regulations than haven't gone into effect. That's your
10:04 14 point. Yes.

10:04 15 MR. TODZO: Exactly. So now only as a result of
10:04 16 the regulations having taken effect -- only as a result of
10:04 17 that does the Tobacco Control Act now cover electronic
10:04 18 cigarette products. But it's undisputed that prior to
10:05 19 May 2016 those products were not regulated at all by the
10:05 20 federal government. That's undisputed. So it was only as
10:05 21 of May 2016 when the reg was finalized that now all of
10:05 22 a sudden there is actually TCA regulation for those
10:05 23 products; and, therefore, now, you can apply the preemption
10:05 24 provision.

10:05 25 But applying the preemption provision to a claim

10:05 1 that arose in 2011 when the statute didn't apply to those
10:05 2 claims, that's a retroactive application. There is nothing
10:05 3 in the congressional record. There is nothing in the Act
10:05 4 itself that says -- or certainly nothing in the new rule
10:05 5 that says not only do we intend for this rule to be
10:05 6 preempted -- as I will get to later, the FDA doesn't
10:05 7 say --

10:05 8 THE COURT: Well, they don't say.

10:05 9 MR. TODZO: Well, we will get there. I mean,
10:05 10 I think their statement that no law that was presented to
10:06 11 them would be preempted by the rule is a statement that
10:06 12 there is no preemption. Like I say, I will get to that in a
10:06 13 minute.

10:06 14 With respect to the retroactive application, there
10:06 15 is nothing in their rule that says that rule should be
10:06 16 retroactively applied. In fact, it's not even applied
10:06 17 today. It's applied two years in the future.

10:06 18 So I think at a minimum assuming you reject
10:06 19 everything else I'm going to say here forward -- I think at
10:06 20 a minimum Your Honor has to adjust the final conclusion and
10:06 21 determine that the preemption can occur only from -- you
10:06 22 know, either the date the rule was finalized or the date
10:06 23 that the requirement takes effect. It's one of those two
10:06 24 dates. That can't possibly be preemption dating back prior
10:06 25 to that.

10:06 1 Even if Your Honor were to think that there's a
10:06 2 possibility that there could be retroactive application of
10:07 3 the preemption provision, it's the defendants' burden to
10:07 4 prove that. I think one of the basic tenets of preemption
10:07 5 law is that absent the clear and manifest intent of Congress
10:07 6 there is no preemption of state laws. That's especially
10:07 7 true whereas here we are talking about a provision of a
10:07 8 state law that covers health and safety. So that's where
10:07 9 that strong presumption against preemption applies.

10:07 10 In the face of a strong presumption against
10:07 11 preemption, you have got a law that at best takes effect in
10:07 12 May of 2016, possibly May of 2018. So, again, there is
10:07 13 nothing there that could say that it could preempt something
10:07 14 going back as far as 2011 or even 2015 or even April of
10:07 15 2016.

10:07 16 One of the reasons why that gap between 2016 and
10:08 17 2018 could be potentially outcome determinative here is
10:08 18 there have been no less than five lawsuits filed challenging
10:08 19 the regs already. I know that's not in the record. If Your
10:08 20 Honor would like, I do have a supplemental request for
10:08 21 judicial notice that just gives you the docket numbers so
10:08 22 you will see there are five different cases challenging the
10:08 23 enactment of these regs.

10:08 24 If at any time between today or May of 2016 and
10:08 25 May of 2018 the regs are either kicked out or if some aspect

10:08 1 of those are kicked out, then the requirement will never
10:08 2 take effect. And if a requirement never takes effect, can
10:08 3 that then have a preemptive effect? That's another
10:08 4 interesting question, which I think the best way to
10:08 5 determine that is even if Your Honor sticks with the idea
10:09 6 that the reg is preempted, it would only be preempted from
10:09 7 May of 2018 forward.

10:09 8 So those are the two timing-related issues I
10:09 9 wanted to touch on.

10:09 10 With respect to Judge Carter's ruling, I apologize
10:09 11 that we got it to you so late. Don't know if you have had
10:09 12 an opportunity to look at it, but Judge Carter in the Five
10:09 13 Palms case --

10:09 14 THE COURT: Well, he took a fairly narrow view of
10:09 15 what labeling related to.

10:09 16 MR. TODZO: That's exactly right. I found that
10:09 17 sort of interesting.

10:09 18 THE COURT: I'm not sure it's supported by the
10:09 19 statute, however.

10:09 20 MR. TODZO: Your Honor, I have looked at it with
10:09 21 the same interest as to where he was finding that. He
10:09 22 certainly doesn't describe exactly where he found it, but
10:09 23 there is some textual support in the statute. What I think
10:09 24 you have to do is you have to compare -- so you know how the
10:10 25 TCA -- it's called preservation of state authority. That

10:10 1 provision has three subdivisions. One is the initial
10:10 2 preservation of state authority provision. Then it has the
10:10 3 preemption provision. And then it has the exception from
10:10 4 preemption provision.

10:10 5 So when you look at the initial preservation
10:10 6 language -- this is 21 USC 387p(a)(1). It says: "Except
10:10 7 as provided in paragraph 2(a)" -- that's the presumption
10:10 8 provision -- "nothing in the subchapter or rules promulgated
10:10 9 under the subchapter shall be construed to limit." So it
10:10 10 uses the language "subchapter or rules promulgated under
10:10 11 the subchapter." That would imply that there is the
10:10 12 statutory provisions. That's under the subchapter. And
10:10 13 then there are the rules promulgated under the subchapter,
10:10 14 which would be things like FDA requirements promulgating the
10:11 15 rules.

10:11 16 Then when you look to the preemption provision,
10:11 17 that language, "rules promulgated under the subchapter," are
10:11 18 absent. It just says, "which is different from or in
10:11 19 addition to a requirement under the provisions of this
10:11 20 subchapter."

10:11 21 So what I was try to figure out if there is
10:11 22 textual support for what Judge Carter did, that's where I
10:11 23 think you find it, that the preemption provision seems to
10:11 24 limit itself to the actual statutory enactments. So when
10:11 25 you look at the statutory enactments --

10:11 1 THE COURT: Wouldn't that be kind of silly? You
10:11 2 know, if the statute preempts conduct or attacking conduct
10:11 3 and there are regulations implementing the preemptive
10:11 4 statute and there is authority to issue those regulations,
10:11 5 would it be kind of silly to conclude that the regulations
10:11 6 aren't preempted?

10:11 7 MR. TODZO: Well, Your Honor, there is always
10:11 8 implied preemption. There is also conflict preemption. So
10:12 9 a reg would have a conflict preemptive effect to the extent
10:12 10 it conflicted with state law. But I think when I look at
10:12 11 what Congress did -- again, there is a limited congressional
10:12 12 record on this. There is not a great amount of legislative
10:12 13 history, but there is some. And the alleged history that we
10:12 14 cited in our brief talks about the idea that Congress really
10:12 15 wanted to limit the preemptive effect of the statute.

10:12 16 I think what happened was so many cigarette
10:12 17 labeling cases, so many cigarette cases, were preempted that
10:12 18 Congress wanted to be careful that there was a federal and
10:12 19 state partnership with respect to tobacco products. So when
10:12 20 I believe it was the House report -- we cited this in our
10:12 21 brief. The quote is that: "An important part of this bill
10:12 22 was actually to remove one of the obstacles that now exist
10:13 23 to more aggressive regulation at the state and local level
10:13 24 by loosening the preemption and allowing states to engage in
10:13 25 regulations that supplement whatever federal regulations are

10:13 1 adopted."

10:13 2 So the idea is that the -- Congress is aware of
10:13 3 what they were doing. They expressly preempt as to their
10:13 4 specific enactments. But when it comes to regulatory
10:13 5 enactments, yes, there is always going to be conflict
10:13 6 preemption, but they didn't intend for those to have an
10:13 7 express preemptive effect. That marries the concept of
10:13 8 limiting the overall preemptive effect of the statute, which
10:13 9 was the congressional goal. And it really marries then the
10:13 10 idea that the FDA had, which is, look, this is a minimum
10:13 11 warning requirement because that's again what Congress would
10:13 12 have intended.

10:13 13 So those are the timing-related issues.

10:14 14 One thing I should mention about Judge Carter is
10:14 15 that -- I'm only aware of three cases that have ruled on TCA
10:14 16 preemption. We cited two of them in our brief, which is the
10:14 17 U.S. Smokeless Tobacco case and the National Advertiser
10:14 18 case. One of them, the U.S. Smokeless case, was the Second
10:14 19 Circuit. The National Advertiser case is the First Circuit.
10:14 20 And now you have Judge Carter. So of the three decisions on
10:14 21 TCA preemption, all have decided that there is no
10:14 22 preemption.

10:14 23 I understand that every requirement is different,
10:14 24 and the preemption analysis is sometimes unique to the
10:14 25 particular claim. But it's just interesting to note that

10:14 1 every judge to look at TCA preemption has so far found that
10:14 2 there is no preemption.

10:14 3 Now moving on to the specific arguments that you
10:15 4 address head on, we have this issue as to whether the
10:15 5 particular labeling -- or I guess what it is called is the
10:15 6 minimum warning requirement within the final rule -- whether
10:15 7 that is a specific enough requirement to trigger preemption
10:15 8 under the Medtronic and Regal cases and the case you cited,
10:15 9 the Papike case.

10:15 10 What I think happened is I believe that Your Honor
10:15 11 conflated the specificity of the warning itself, the
10:15 12 language, with the specificity of the application of the
10:15 13 particular requirement. So when I look back at the
10:15 14 Medtronic case and the Regal case, which further explained
10:15 15 Medtronic, and even the Papike case, in each of those
10:15 16 instances, the distinction was whether a requirement was
10:15 17 specific as to a particular device or whether it was general
10:16 18 as to all devices or a whole group of devices.

10:16 19 So when in Medtronic the only applicable
10:16 20 regulations were the general ones, the ones that apply to
10:16 21 all medical devices as opposed to in Regal where there was
10:16 22 the premarket approval -- so not only was it specific as to
10:16 23 the particular type of device, but it was actually specific
10:16 24 as to that manufacturer's specific device. You know, the
10:16 25 specific skew would be the equivalent in a consumer product.

10:16 1 Then with Papike it was specific as to Tampons. It wasn't
10:16 2 one of the general labeling requirements.

10:16 3 What I actually found helpful, if you look at --
10:16 4 there is an exhibit that the defendants submitted with their
10:17 5 Request for Judicial Notice. There is a labeling manual
10:17 6 that was submitted as Exhibit B to I believe Mr. Gabriel's
10:17 7 declaration or the Request for Judicial Notice. It was ECF
10:17 8 74-2. This is a labeling guide for medical devices from the
10:17 9 FDA. When I looked at it, it has this distinction between
10:17 10 the general device labeling -- in terms of page number, I'm
10:17 11 going to go with the exhibit page number. It's Exhibit B,
10:17 12 page 20.

10:17 13 It has what is called "General Device Labeling,"
10:17 14 and the introduction says: "These regulations specify the
10:17 15 minimum requirements for all devices." Then it goes on --
10:17 16 in Exhibit B at page 25, it gets into labeling requirements
10:18 17 for specific devices. And, of course, one of the specific
10:18 18 devices that it talks about menstrual Tampons, and it talks
10:18 19 about how there is a specific warning requirement.

10:18 20 So the upshot is when you have the general
10:18 21 requirements that apply to all products within a category,
10:18 22 those are not preempted. But then when the FDA looks at the
10:18 23 specific device or the specific product and then issues
10:18 24 regulations concerning that product, those would be
10:18 25 preempted.

10:18 1 So here when you look at the new regs or the 21
10:18 2 CFR 1143.3(a), by its own terms, it applies to cigarettes;
10:18 3 smokeless tobacco; and all covered tobacco products, which
10:18 4 includes gels, dissolvables, water pipe tobacco, pipe
10:19 5 tobacco, e-cigarettes, including refillable personal
10:19 6 vaporizers, vape pens, and e-cigarettes themselves. So it
10:19 7 applies to the entire class.

10:19 8 Yes, it is a specific -- there is specific warning
10:19 9 language. But I don't think that's in essence any different
10:19 10 than when they have specific -- a statement that says you
10:19 11 have to put the origin in the labeling. You have to say
10:19 12 this product is manufactured by and add the manufacturer's
10:19 13 name. That the general labeling requirements that they were
10:19 14 talking about in Medtronic. So that's the difference.

10:19 15 Again, I think when you look at it it makes sense
10:19 16 then. It's consistent with the FDA's policy of having
10:19 17 general requirements being, quote, "minimum requirements"
10:19 18 for them to title that particular regulation as a minimum
10:19 19 requirement. It's exactly what they did with respect to the
10:20 20 general device labeling.

10:20 21 There are a couple of other things on this point.
10:20 22 In your tentative on page four, there was a statement in the
10:20 23 second paragraph under Subsection (A). Your Honor says
10:20 24 that: "The Court observes that the clear and unambiguous
10:20 25 language of the preemption provision of the TCA preempts

10:20 1 states from requiring any particular labeling of tobacco
10:20 2 products." So I think when Your Honor is looking at it in
10:20 3 those terms that's very overbroad because that's not the
10:20 4 language of the provision. The language of the provision is
10:20 5 going to preempt only where there is a federal requirement
10:20 6 in place as to that particular product.

10:20 7 That's again the crux of the difference. We are
10:20 8 not talking about just because there is a labeling -- a
10:21 9 potential labeling requirement that does apply to
10:21 10 e-cigarettes in addition to all other tobacco products, you
10:21 11 know, that that now preempts all labeling requirements. In
10:21 12 essence, that would preempt all labeling as to cigarettes,
10:21 13 smokeless tobacco, all the ones I mentioned, gels,
10:21 14 dissolvables. I think that's way overbroad.

10:21 15 There is one other statement at the bottom of page
10:21 16 four where you said: "The FDA has promulgated a labeling
10:21 17 requirement for e-cigarettes." Again, I don't think that's
10:21 18 quite accurate because the FDA has promulgated a labeling
10:21 19 requirement for all tobacco products. Again, that's where
10:21 20 the distinction lies.

10:21 21 The next thing I wanted to talk about was the
10:22 22 exemption. I understand Your Honor looks at the claims and
10:22 23 says, look, all these claims relate to failure to warn. I
10:22 24 agree. We can't hide from that.

10:22 25 THE COURT: Indeed, that's what you are putting

10:22 1 forward.

10:22 2 MR. TODZO: Right. Our case is essentially that
10:22 3 the defendant has failed to disclose hazards associated with
10:22 4 use and exposure to their products. That's what our case is
10:22 5 about. So there are two aspects to the case. On the one
10:22 6 hand show, we are going to have to show that use and
10:22 7 exposure of the products results in some type of harm that
10:22 8 the defendant had a duty to disclose, and they didn't do it.
10:22 9 So there is the use and exposure portion of the case. And
10:22 10 there is the failure to disclose or broadly stated a
10:22 11 labeling-type piece. So it relates to both.

10:23 12 So now what do you do? I'm sort of going on the
10:23 13 assumption now that the preemption provision can extend to
10:23 14 FDA's requirements. So there is the first part that Judge
10:23 15 Carter viewed that it only extends to statutory
10:23 16 requirements, but let's talk for a second as if it applied
10:23 17 to the FDA's requirements and assuming that it is a specific
10:23 18 enough requirement.

10:23 19 So now you have a requirement that relates to both
10:23 20 the preemption and to the exemption. So in that case, what
10:23 21 do you do? And I think that the two Circuit Court cases,
10:23 22 both the U.S. Tobacco case and the National Association of
10:23 23 Tobacco Outlets case -- should I give the cites for those
10:23 24 for the record? They're in the briefs.

10:24 25 THE COURT: They're in the briefs.

10:24 1 MR. TODZO: Anyway, in both of those cases, they
10:24 2 said, look -- the claims at issue there, which were whether
10:24 3 a particular state can ban the sale of flavored tobacco
10:24 4 products -- so it relates to tobacco product standards
10:24 5 because whether or not a tobacco product is flavored is a
10:24 6 standard relating to the particular product. And, indeed,
10:24 7 there were regulations concerning flavorings, but it also
10:24 8 relates to the sale and distribution of the products. So
10:24 9 the Court said, well, when it arguably relates to both, you
10:24 10 have got to go with the exemption because -- the Courts
10:24 11 basically conclude you give broad effect to the exemption,
10:24 12 and you narrowly construe the preemption provision.

10:24 13 I'm not sure they explain exactly why, but I think
10:24 14 it's clear that -- again, we are talking about preemption.
10:25 15 We are talking about where it has to be the clear and
10:25 16 manifest intention of Congress to preempt a particular type
10:25 17 of claim. And there is a strong presumption against
10:25 18 preemption of a health and safety matter. So in those
10:25 19 instances where something arguably relates to both exposure
10:25 20 and labeling, I think you have to go with the exemption
10:25 21 because that's more consistent with the exemption from
10:25 22 preemption.

10:25 23 The one claim in particular that I wanted to touch
10:25 24 on with respect to exposure is Prop 65. That is the essence
10:25 25 of the claim under Prop 65. When you look at the statutory

10:25 1 provision under which the claim was brought, it specifically
10:25 2 says: "No person in the course of doing business shall
10:25 3 knowingly and intentionally expose any individual to a
10:25 4 chemical known to the State to cause cancer without
10:26 5 providing the clear and usable warning." So on its face, it
10:26 6 has both. It has both the warning piece and the exposure
10:26 7 piece.

10:26 8 Indeed, one of the things -- Prop 65 is somewhat
10:26 9 unique in that there is a big burden on the defendant, not a
10:26 10 huge burden on the plaintiff thankfully, where what we need
10:26 11 to show is that there is exposure, any exposure at all, to
10:26 12 the particular chemical here, formaldehyde. So that's all
10:26 13 we are going to need to show.

10:26 14 Then the burden is going to shift to the
10:26 15 defendant. And that's the burden -- we talk about that in
10:26 16 Health and Safety Code 25249.10(c), which is known as the
10:26 17 exposure defense. And that's where they are going to need
10:26 18 to come with evidence to show that any of the exposures are
10:26 19 below the threshold requiring the warning. So the whole
10:26 20 case is fought out about exposure.

10:26 21 Indeed, when you look at the definition of
10:26 22 "consumer product exposure" in the regs -- I know the
10:26 23 defendant says we are talking about exposure to a chemical
10:27 24 and not the product. That's a distinction they draw, but
10:27 25 that's not a distinction that Prop 65 looks at because Prop

10:27 1 65 says: "A consumer product exposure is an exposure that
10:27 2 results from a person's acquisition, purchase, storage,
10:27 3 consumption, or other reasonably foreseeable use of a
10:27 4 consumer good." So it's of the good itself. I just don't
10:27 5 think that it's correct to sort of gloss over that piece.

10:27 6 I think the way Your Honor was looking at it is
10:27 7 what's the gravamen of the claim? Is this claim based on
10:27 8 exposure, or is it based on labeling? But that's not the
10:27 9 language of the preemption provision or the exemption
10:27 10 provision. They use "relate to." I know there are some
10:27 11 statutes -- I believe the Cigarette Labeling Act actually
10:28 12 uses the "based on" language. It's based on smoking and
10:28 13 health. But that's not the case here. We are talking about
10:28 14 relating to. I think it's very tenuous to say that these
10:28 15 claims don't relate to exposure when that's actually part of
10:28 16 our burden, which is to show exposure and use somehow
10:28 17 results in some harm that needed to be disclosed or warned
10:28 18 for.

10:28 19 On the labeling issue -- and I think Your Honor
10:28 20 went obviously the right way on that issue in terms of Prop
10:28 21 65 and whether or not it constitutes labeling. The one
10:28 22 thing I would like to point out is that the AMI case, the
10:28 23 Leman case -- in that case, they used that very, very broad
10:28 24 definition of "labeling," which is anything that supplements
10:28 25 or explains the product, which I think arguably would extend

10:29 1 to all advertising for the product.

10:29 2 Indeed, back to that FDA Labeling Guide that I
10:29 3 mentioned before, the FDA when construing other aspects of
10:29 4 the FDCA does talk about -- this is again Exhibit B to the
10:29 5 Gabriel declaration. At page three, it says: "According to
10:29 6 an appellate court decision, most, if not all, advertising
10:29 7 is labeling. The term 'labeling' is defined in the FDC to
10:29 8 include all printed matter accompanying an article.
10:29 9 Congress did not and we cannot exclude from the definition
10:29 10 printed matter which constitutes advertising."

10:29 11 So I can understand why Leman in its case went
10:29 12 with that broad definition which would sweep all advertising
10:30 13 within the guise of labeling. The problem is here we can't
10:30 14 because Congress drew a distinction between labeling on the
10:30 15 one hand and advertising on the other because it included
10:30 16 labeling in the preemption -- the matter which is preempted,
10:30 17 but it excluded advertising. So some printed matter that
10:30 18 accompanies an article is preempted. Some printed matter
10:30 19 that accompanies an article is not preempted.

10:30 20 I think that's another reason why it doesn't make
10:30 21 sense to follow the Leman case here. Leman -- again, for
10:30 22 the Meat Inspection Act, that might be fine, but with
10:30 23 respect to the Tobacco Control Act, you just can't give such
10:30 24 a broad reading to the term "labeling." Again, of course we
10:30 25 have what Judge Carter did, which is a very restricted view.

10:31 1 And then the last point I wanted to make has to do
10:31 2 with the FDA's interpretation of the rule itself. Your
10:31 3 Honor obviously has a view on that. The difficulty I have
10:31 4 is when I look at the comments and then I look at the
10:31 5 response -- when you look at the comments, the FDA
10:31 6 specifically says: "A number of comments sought an
10:31 7 affirmative statement from the FDA that the NPRM would
10:31 8 preempt state and local warning requirements." A few of the
10:31 9 comments directly reference California's health requirements
10:31 10 for products containing nicotine, a notice required by Prop
10:31 11 65."

10:31 12 So then the FDA goes through, and they analyze the
10:31 13 scope of the TCA. And then the FDA concludes: "No state or
10:31 14 local laws in effect at the close of the public comment
10:31 15 period were identified that the FDA determined would be
10:32 16 preempted by this final rule." So that is a statement.
10:32 17 That is a statement with respect to the particular state
10:32 18 laws that were presented. Then we had the separate comment
10:32 19 from the 29 Attorneys General who said we want a statement
10:32 20 that says these aren't preempted.

10:32 21 Well, what more could they be asking for than this
10:32 22 statement saying that they are not preempted? That's
10:32 23 exactly what the commenter on the AG side was looking for
10:32 24 and what the commenter on the industry side was looking to
10:32 25 get the opposite. If the industry had gotten the statement

10:32 1 saying that Prop 65 is preempted, well, I'm sure Mr. Gabriel
10:32 2 would have been jumping up and down saying of course, Your
10:32 3 Honor, the FDA says that it is preempted.

10:32 4 I understand with respect to the change from
10:32 5 warning requirement to a minimum warning requirement. The
10:32 6 FDA did give an additional reason for that. I mean, the
10:33 7 upshot is the same. The upshot is that it is a minimum
10:33 8 warning requirement, and parties are free to add additional
10:33 9 warnings. You know, I think it's very difficult to say that
10:33 10 manifests an intent to preempt when again it's simply a
10:33 11 minimum warning requirement. I think those two play
10:33 12 together.

10:33 13 Of course the FDA's determination on this point is
10:33 14 entitled to -- you know, I think we talked about the Chevron
10:33 15 deference in our paper, and that's the type of deference
10:33 16 that would be afforded here, especially here when the real
10:33 17 preemptive force of the regulation depends on what type of
10:33 18 requirement we are talking about. Is it a general
10:33 19 requirement as to all tobacco products, or is it a specific
10:33 20 requirement as to e-cigarette products? I think the FDA is
10:34 21 in a very good position to opine as to what type of
10:34 22 requirement it is. They did so and determined it's a
10:34 23 minimum warning requirement.

10:34 24 So, Your Honor, unless you have questions for me,
10:34 25 I'm done. Thank you.

10 : 34 1 THE COURT: Thank you.

10 : 34 2 Mr. Gabriel. First of all, what about the timing

10 : 34 3 issue?

10 : 34 4 MR. GABRIEL: With respect to the effective date?

10 : 34 5 THE COURT: Correct.

10 : 34 6 MR. GABRIEL: First, let me just say what the

10 : 34 7 Court has already indicated. None of this was argued in

10 : 34 8 their opposition to the motion, so it's an argument that I

10 : 34 9 am happy to respond to. I can do it extemporaneously.

10 : 34 10 THE COURT: Well, it has not been briefed. I

10 : 34 11 frankly would like to give the parties an opportunity to

10 : 34 12 brief the timing issue.

10 : 34 13 MR. GABRIEL: Okay. Let me address part of it.

10 : 34 14 One of the arguments being made here is that whatever may

10 : 34 15 happen in the future, for example, damages, some kind of

10 : 35 16 positive injunctive relief this Court orders, has a label

10 : 35 17 that says or has a Prop 65 warning. It seems to me what is

10 : 35 18 preempted are all requirements related to labeling in

10 : 35 19 addition to or different from. And whenever those

10 : 35 20 requirements are imposed by virtue of a finding of liability

10 : 35 21 after the rule has been adopted, that's what is preempted.

10 : 35 22 The idea that two years from now or six months

10 : 35 23 from now or nine months from now this Court imposing some

10 : 35 24 liability or a jury based upon a state requirement under an

10 : 35 25 unfair competition law that would be preempted, if it's

10:35 1 after the date of the rule be adopted, the field has been
10:35 2 preempted irrespective of the effective date of the rule.

10:35 3 THE COURT: Well, query. It seems to me if you
10:35 4 are arguing preemption on the basis of the regulation -- how
10:36 5 can it do that before it goes into effect? -- I can see the
10:36 6 argument that the regulation even if it's not in effect
10:36 7 suggests a conflict preemption or some other basis for
10:36 8 preemption, but direct preemption when the rule isn't in
10:36 9 effect --

10:36 10 MR. GABRIEL: Your Honor is previewing what we
10:36 11 would intend if you give both parties the opportunity to
10:36 12 brief it. I can articulate what the Court just said. There
10:36 13 are other arguments that arise from it. I am happy to do
10:36 14 it, but it seems to me it would be better to be dealt with
10:36 15 in briefing.

10:36 16 THE COURT: I agree.

10:36 17 MR. GABRIEL: Let me start with what I agree with
10:36 18 what counsel said. It is absolutely true that the gravamen
10:36 19 of all these claims is a failure to warn. What has been
10:36 20 conflated here by the plaintiff is what is this case about?
10:36 21 What are the claims? Plaintiffs' counsel keeps referring
10:36 22 to, well, there is the exposure to part, and there is the
10:36 23 failure to warn part, the exposure and use part.

10:37 24 He made some comment about, well, you know what,
10:37 25 we are going to have show and the claim here is that the use

10:37 1 and exposure results in some harm. There is no claim here
10:37 2 at all -- you can read every word of the 200-paragraph
10:37 3 Second Amended Complaint -- that any of the plaintiffs have
10:37 4 been harmed by virtue of exposure. No claim.

10:37 5 In fact, the specifics in the Complaint are that
10:37 6 somehow the plaintiffs have been misled into believing, gee,
10:37 7 this may be okay for me. There is no claim here that the
10:37 8 plaintiffs have been harmed by anything other than the
10:37 9 failure to warn. That's not only the gravamen of all the
10:37 10 claims, but that is the complete universe of all the claims.
10:37 11 So this dichotomy that has been set up -- well, we have got
10:37 12 two separate things going on here. We have got the
10:37 13 failure-to-warn claim, and then we have got the use and
10:37 14 exposure claim -- no, that's not true, Your Honor.

10:37 15 The Complaint is crystal clear. There is no
10:38 16 claim here -- no plaintiff is saying as part of a putative
10:38 17 class action I have been harmed because I'm sick. I will
10:38 18 live less long. It's simply why didn't somebody tells us in
10:38 19 a warning on the packaging or labeling that this could be
10:38 20 harmful?

10:38 21 The same thing is true for Prop 65. There is no
10:38 22 cause of action for any plaintiff under Prop 65 for exposure
10:38 23 or use. The cause of action exists simply by virtue of a
10:38 24 failure to use a mandated State warning in the event that
10:38 25 the exposure to a list of 800 different chemicals that the

10:38 1 State has promulgated exceeds a certain limit. It's a
10:38 2 failure-to-warn claim. There is no claim in the case that
10:38 3 any plaintiff has been harmed by exposure to formaldehyde.
10:38 4 None. It's simply we should have been warned. And when we
10:39 5 read only a nicotine warning, that wasn't good enough for
10:39 6 us. We should have been told something more.

10:39 7 So the idea that there are two separate things
10:39 8 here I believe is incorrect. An extremely careful reading
10:39 9 of the Second Amended Consolidated Complaint will confirm
10:39 10 that. And I think the Court's analysis in the tentative not
10:39 11 just about the gravamen but what all the claims are about,
10:39 12 is correct. This is about a failure to warn, all of them
10:39 13 articulated under a variety of different names. Whether
10:39 14 it's UCL or some Illinois statute, they all relate to the
10:39 15 same thing.

10:39 16 And the same thing is true for Prop 65. There is
10:39 17 no liability under Prop 65 for exposing anyone in California
10:39 18 to a chemical. The liability is it's in there. It's in
10:39 19 there in an amount that exceeds a safe harbor. Under those
10:39 20 circumstances, the failure to use a statutorily or a
10:39 21 California regulation-compelled warning is where the
10:39 22 liability is. That's where the penalty is. That's where
10:39 23 the remedy is. Not simply because you are exposing someone
10:40 24 to the chemicals.

10:40 25 With respect to the distinction about Medtronic

10:40 1 and the suggestion that Your Honor has conflated, the
10:40 2 general versus specific as between product and the warning
10:40 3 itself, in Your Honor's tentative, quoting from Medtronic,
10:40 4 this is the distinction that Medtronic makes. I'm reading
10:40 5 from the Court's decision. The Court held: "The generality
10:40 6 of those requirements" -- the requirements were to include
10:40 7 with a device a label containing information for use any
10:40 8 relevant hazards, contraindications, side effects. That's a
10:40 9 list of generalities. The Court says: "The generality of
10:40 10 those requirements made this quite unlike a case in which
10:40 11 the federal government has weighed the competing interests
10:40 12 relevant to the particular requirement in question reaching
10:40 13 an unambiguous conclusion about how these competing
10:40 14 considerations should be resolved in a particular case or
10:41 15 set of cases and implemented that conclusion via a specific
10:41 16 mandate on manufacturers or producers."

10:41 17 How much more of a specific mandate can we have
10:41 18 than here is the warning for nicotine? Here's how big it
10:41 19 has to be. Here's where it has to go. So this
10:41 20 circumstance, as the Court points out in the tentative, is
10:41 21 clearly distinguishable from the Lohr case where all Lohr
10:41 22 was talking about is you have got to include something on
10:41 23 your label about how you use the product, anything about
10:41 24 hazardous. That's general. The specific here relates to
10:41 25 the nature of the specific mandate.

10:41 1 The argument, well, a lot of different things are
10:41 2 covered by the definition of tobacco products, so ipso facto
10:41 3 it's general because it covers gels and other things -- if
10:41 4 we had nine statutes and they were all separate, and one was
10:41 5 for electronic cigarettes and another one was for e-liquids
10:42 6 and another one was for gels, that would make a difference?
10:42 7 I don't think the argument makes any sense. I think the
10:42 8 Court has it right, which is the Lara case is absolutely
10:42 9 clearly distinguishable.

10:42 10 As to the whole concept of what the FDA was saying
10:42 11 or not saying in that statement, I think the Court is
10:42 12 correct. I think it's very simple. All 29 Attorney
10:42 13 Generals asked for something. There were a lot of different
10:42 14 comments. Reading the English language of that statement,
10:42 15 the FDA has not made a determination with respect to any
10:42 16 statute. Why would it because the circumstances could be a
10:42 17 myriad?

10:42 18 They were asked to make a determination -- the FDA
10:42 19 was asked to make a determination with respect to Prop 65,
10:42 20 and it didn't. The idea that that turns into so therefore
10:42 21 it's not preempted doesn't make sense. There is no
10:42 22 authority -- we haven't seen any -- for the proposition that
10:42 23 if the FDA says we haven't made a determination that that
10:43 24 means it's not preempted.

10:43 25 I think the plain English of that sentence reads

10:43 1 exactly the way it states, which is one way or another we
10:43 2 haven't determined. As I said, why would it? Under the
10:43 3 circumstances of a final rule -- with all kinds of different
10:43 4 requests for different scenarios, either specifically -- why
10:43 5 don't you determine that this is not preempted? -- or
10:43 6 generally, the FDA says we haven't made that determination.

10:43 7 With respect to the minimum requirement on the
10:43 8 label issue, we briefed this, Your Honor. The reason that
10:43 9 word was changed to "minimum" was the FDA explained the
10:43 10 reason. There were two reasons. One is there are already
10:43 11 companies voluntarily doing other things or other warnings.

10:43 12 As counsel said, parties are free to add
10:44 13 additional warnings. That's right. That's what the FDA
10:44 14 said. An individual manufacturer can "voluntarily" --
10:44 15 that's the FDA's word -- have additional warnings, or the
10:44 16 FDA may if it decides to require additional warnings. The
10:44 17 parties don't include a state requirement to add warnings.

10:44 18 THE COURT: The parties' flexibility doesn't
10:44 19 translate into a carte blanch or state regulation.

10:44 20 MR. GABRIEL: Your Honor said it better than I
10:44 21 tried to say it five sentences. I agree, Your Honor.

10:44 22 One thing I wanted to point out just for the
10:44 23 Court's information is there is a discussion in the
10:44 24 Advertising Section of the tentative that deals with one
10:44 25 type of warning that Prop 65 authorizes, which is the

10:44 1 warning related to signs. Let me direct the Court's
10:44 2 attention to that. This is at the bottom of page nine and
10:45 3 the top of page ten. It says: "Defendants may comply with
10:45 4 a Prop 65 warning by a system of signs, public advertising,
10:45 5 identifying the system, and toll-free information." And
10:45 6 that was true at the time that the briefs were submitted.

10:45 7 The day after the reply brief was submitted by the
10:45 8 defendants, Your Honor, the California Office of
10:45 9 Environmental Health, Hazard, and Assessment released final
10:45 10 amendments to those rules. The section cited which
10:45 11 addresses signs -- the types of warning requirements -- has
10:45 12 been replaced by a new section. That new section deletes
10:45 13 anything having to do with signs or 800 numbers. We can
10:45 14 submit this, Your Honor. I didn't want to add to the paper
10:45 15 already before the Court.

10:45 16 That warning requirement -- the ability to warn
10:45 17 based upon what is being pointed to by the plaintiff will be
10:46 18 gone. Instead, there will be a new set of warnings. These
10:46 19 were as I said -- the section that is cited, Section 25603.1
10:46 20 of Article VI, has been replaced by a new section. In any
10:46 21 event, it's just a point of information for the Court.

10:46 22 I understand the Court's ruling with respect to
10:46 23 the Leman case, the critique in Leman of the Ninth Circuit
10:46 24 case. The Court recognizes in its ruling that there may be
10:46 25 some arguments about the applicability of the Ninth Circuit

10:46 1 opinion, but I will not try to argue with the Court about
10:46 2 being bound by the Ninth Circuit ruling in that case.

10:46 3 It seems to me, Your Honor, that the Court in its
10:46 4 tentative has nailed it in terms of exactly what is going on
10:46 5 here. This is a set of claims by a putative class
10:47 6 essentially saying had you told us that this product could
10:47 7 hurt us beyond telling us about nicotine we would have done
10:47 8 something different. It's about warnings. There is no
10:47 9 claim about harm.

10:47 10 The notion that it's exposure to or use as the
10:47 11 predicate for this case is not what this case is about. It
10:47 12 is a failure to warn a group of people about so-called
10:47 13 additional dangers. All of those claims as the Court points
10:47 14 out are predicated upon labeling or packaging deficiencies.
10:47 15 That's what the FDA has decided, and that's what the statute
10:47 16 preempts, labeling. It makes sense, Your Honor.

10:47 17 Just if I may divert slightly from the record to
10:48 18 food labeling. We all buy food, and we see that little box
10:48 19 that has in it all the things that the FDA believes we
10:48 20 should know about, which is what's a serving? How many
10:48 21 servings in a package? That's specific labeling
10:48 22 requirements. That can't be touched by any state because
10:48 23 the FDA has determined its exclusive jurisdiction with
10:48 24 respect to that.

10:48 25 That's what is going on with cigarettes. The

10:48 1 states have plenty of power to co-regulate. That's what the
10:48 2 exemptions from the preemption is all about. Exposure to,
10:48 3 use of, all relates to where should the product be in the
10:48 4 store? How old do you have to be to buy the product? Who
10:48 5 can be in the ads? Does it have to be an adult? Does it
10:48 6 have to be somebody over 30? The state has all kinds of
10:48 7 powers which the State of California is happily exercising,
10:48 8 including most recently, related to what it can do.

10:49 9 That is consistent with what counsel has
10:49 10 represented to the Court the FDA's theory of regulations.
10:49 11 The states can come and join in and regulate. But what the
10:49 12 states can't do and what this rule is all about is the state
10:49 13 can't get involved with requirements that are different from
10:49 14 or in addition to labeling requirements. We have the most
10:49 15 specific type of requirement you can have: where it goes in
10:49 16 the labeling, what it says, how big it needs to be.

10:49 17 If the FDA some day determines there should be
10:49 18 more warnings as it has indicated it is contemplating, it
10:49 19 will do so. If manufacturers want to voluntarily put more
10:49 20 warnings on the labels or packaging, they can do so. What
10:49 21 the state can't do by virtue of liability through Prop 65 or
10:49 22 through a class action or otherwise is create a circumstance
10:49 23 where anybody can sue and take the position that I should
10:49 24 have learned more from the packaging and labeling and I
10:49 25 didn't, so now I will have a claim. You will have 50 states

10:49 1 interpreting their own laws and determining what should or
10:50 2 should not be on a label.

10:50 3 Your Honor, we would submit on the tentative. If
10:50 4 the Court wants more briefing on the issues that were
10:50 5 raised, we can respond to them.

10:50 6 One comment about Judge Carter's decision and
10:50 7 maybe we can brief that as well. I think so far I'm in
10:50 8 agreement with everything I heard, which is I don't quite
10:50 9 understand where the Court came up with the idea that
10:50 10 labeling means a point of origin only, and that's the only
10:50 11 thing that's preempted under the definition of "labeling" in
10:50 12 this particular statute. I don't see that anywhere.
10:50 13 Counsel has kind of speculated about that. I think the case
10:50 14 is clearly distinguishable. It doesn't really have any
10:50 15 impact on the decision of the Court.

10:50 16 We are willing to accept the tentative. If the
10:50 17 Court wants some briefing on the other issues, that's fine.

10:50 18 I would like to remind the Court this entire
10:50 19 action has been stayed except for the pleading stage. The
10:50 20 defendants suggested to the Court it should have just been
10:50 21 stayed completely independent of any ferreting out of the
10:51 22 pleadings. I think what happened is the fortuity of --
10:51 23 here's the final rule that came out afterwards, after a
10:51 24 Second Amended Consolidated Complaint. So the defendants
10:51 25 obviously felt compelled to brief the preemption issue. We

10:51 1 certainly didn't want to waive it. But now we are entering
10:51 2 an arena that -- you know, this is where we are.

10:51 3 So I think it's important that the Court does rule
10:51 4 on this motion. I think it will make a difference in the
10:51 5 real world for the parties. And if there is some notion
10:51 6 that we should wait yet again, which is essentially what
10:51 7 plaintiffs' counsel is suggesting, why doesn't plaintiffs'
10:51 8 counsel dismiss the case without prejudice, and it can wait
10:51 9 and see --

10:51 10 THE COURT: Well, there are obviously tolling
10:51 11 problems, but --

10:51 12 MR. GABRIEL: The argument that, by the way, there
10:51 13 is an attack on the regulations, why don't we kind of wait
10:51 14 and see what happens with that. You know, there is an
10:51 15 attack on the IRS by different taxpayers claiming it's
10:52 16 unconstitutional, so --

10:52 17 THE COURT: But you probably still pay your taxes
10:52 18 every April 15.

10:52 19 MR. GABRIEL: Correct. That's right.

10:52 20 Let me make some final comment about this. Again,
10:52 21 I would concede it's outside the record. The plaintiffs
10:52 22 asserting the Prop 65 cases -- you know, they're not sitting
10:52 23 back to wait and see what happens. Whether it's in this
10:52 24 class action or the plaintiffs that are filing pure Prop 65
10:52 25 cases, they are actively litigating against the defendants

10:52 1 claiming that there are violations of the statute
10:52 2 notwithstanding the rule being promulgated.

10:52 3 I just don't see a circumstance where in the
10:52 4 future a Court can impose either damages or injunctive
10:52 5 relief addressing the issue of labeling, not after there has
10:52 6 been a final rule adopted by the FDA, which we believe
10:52 7 preempts all of that activity.

10:52 8 Thank you, Your Honor.

10:52 9 THE COURT: Thank you.

10:53 10 Mr. Todzo, you have five minutes.

10:53 11 MR. TODZO: Thank you, Your Honor.

10:53 12 I don't really have that much to add. I just
10:53 13 thought what is interesting was with respect to does the
10:53 14 case relate to exposure at all? Mr. Gabriel was saying that
10:53 15 no, no, no, everything is based on a failure to warn. But
10:53 16 failure to warn about what? It's a failure to warn about
10:53 17 certain things that happens when users are exposed to the
10:53 18 products. So it's that second part that -- if we end up
10:53 19 saying --

10:53 20 THE COURT: Well, isn't there a difference between
10:53 21 claiming I used these devices and was exposed to
10:53 22 formaldehyde and have some chronic lung disease as opposed
10:53 23 to you didn't warn me, and if you had, I wouldn't have used
10:53 24 them? Aren't those distinct?

10:53 25 MR. TODZO: No doubt those are different. But the

10:54 1 second one, that if you had told me that my use or exposure
10:54 2 to these products would cause me harm, I still as a
10:54 3 plaintiff proving that case -- just I wouldn't have bought
10:54 4 the product if you had told me that, I still need to prove
10:54 5 that use or exposure results in something. I need to show
10:54 6 that it results in some type of harm that I have now an
10:54 7 increased risk of.

10:54 8 THE COURT: They may be a common element, but they
10:54 9 are distinct claims. One is essentially a personal injury
10:54 10 claim, and one is a statutory claim for failure to disclose.

10:54 11 MR. TODZO: I just come back to failure to
10:54 12 disclose about what? They has to be something that they
10:54 13 failed to disclose. They had to fail to disclose adverse
10:54 14 health effects from use of the products.

10:54 15 THE COURT: I agree with you that there is a
10:54 16 common element, but in terms of what the claim is, you
10:54 17 failed to tell me this was harmful, yes, and you are going
10:54 18 to have prove that it was harmful. If you are saying I was
10:55 19 exposed to this and I was harmed, yes, you are going to have
10:55 20 to prove it was harmful, but you are going to have to prove
10:55 21 that the plaintiff was in fact harmed. That's different.

10:55 22 MR. TODZO: I agree that there is a difference,
10:55 23 but they both still relate to exposure, especially again on
10:55 24 the Prop 65 where we need to prove that. That's an element
10:55 25 of our case.

10:55 1 With respect to -- I think maybe it does make
10:55 2 sense to brief the timing issue. Again, there is nothing --
10:55 3 Mr. Gabriel's idea that -- you know, imposition of a
10:55 4 remedy -- somehow that's what is preempted -- again, that
10:55 5 would be imposition of a labeling remedy, i.e., injunctive
10:55 6 relief, but that speaks nothing to damages dating back.
10:55 7 Again, that's something we can brief for Your Honor.

10:55 8 I think that's it for now.

10:56 9 THE COURT: Okay. Well, how about concurrent
10:56 10 briefs, 15 pages, dealing with this timing issue. If you
10:56 11 want to deal with Judge Carter's decision as part of that 15
10:56 12 pages, that's fine. I won't restrict you from going into
10:56 13 that.

10:56 14 How much time would you like to generate those
10:56 15 briefs?

10:56 16 MR. GABRIEL: Ten days or a week. It's a new
10:56 17 issue.

10:56 18 THE COURT: Yes, it is. The case is stayed for
10:56 19 all other purposes, so I don't think we are actually under
10:56 20 the gun time wise. You tell me what you want.

10:56 21 MR. GABRIEL: Ten days.

10:56 22 MR. TODZO: Let me see my calendar first.

10:56 23 THE COURT: Why don't we say Monday, the 26th. Is
10:56 24 that enough time?

10:57 25 MR. GABRIEL: That's fine with me.

10 : 57 1 MR. TODZO: Yes, Your Honor.
10 : 57 2 THE COURT: Okay, 15 pages. And the matter will
10 : 57 3 stand submitted once we received the supplemental briefs.

10 : 57 4 MR. TODZO: Thank you, Your Honor.

10 : 57 5 MR. GABRIEL: Thank you, Your Honor.

10 : 57 6 (Whereupon, the proceedings were concluded.)

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10 : 57 6 CERTIFICATE

10 : 57 7

10 : 57 8 I hereby certify that pursuant to Section 753,
10 : 57 9 Title 28, United States Code, the foregoing is a true and
10 : 57 10 correct transcript of the stenographically reported
10 : 57 11 proceedings held in the above-entitled matter and that the
10 : 57 12 transcript page format is in conformance with the
10 : 57 13 regulations of the Judicial Conference of the United States.

10 : 57 14

10 : 57 15 Date: September 28, 2016

10 : 57 16

10 : 57 17 /s/ Sharon A. Seffens 9/28/16

10 : 57 18 SHARON A. SEFFENS, U.S. COURT REPORTER

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SHARON A. SEFFENS, U.S. DISTRICT COURT REPORTER